

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:) Chapter 7
)
Argose, Inc.,) Case No. 04-12533 (MFW)
)
Debtor.)

MEMORANDUM OPINION¹

Before the Court is the chapter 7 Trustee's uncontested Motion for Entry of an Order Modifying Final Order Approving the Stipulation Authorizing Chapter 7 Trustee to Use Cash Collateral and Agreement for Liquidation of Debtor's Collateral and Approving Limited Notice (the "Modification Motion"). For the reasons set forth below, the Modification Motion will be denied.

I. **BACKGROUND**

On September 4, 2004, Argose, Inc. (the "Debtor") filed a voluntary petition for relief under chapter 7 of the Bankruptcy Code. The office of the United States Trustee appointed George L. Miller (the "Trustee") as the chapter 7 Trustee. The Debtor had been engaged in the glucose technology industry. Its assets consisted primarily of intellectual property, research data, and cash of approximately \$200,000.

¹ This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure, which is made applicable to contested matters by Rule 9014.

On December 3, 2004, the Court entered a final order which approved a stipulation between the Trustee and INVESCO Private Capital, Inc. (the "Lender") authorizing the Trustee to use cash collateral to liquidate the Debtor's assets for the benefit of the Lender (the "Stipulation"). The Stipulation provided that \$50,000 plus either \$25,000 or 5 percent of the proceeds of the sale of the assets, whichever is less, would be paid to the unsecured creditors. The Stipulation also provided that the direct costs of maintaining the assets, including patent counsel's fees, would be paid in full. Those costs totaled \$120,158.43. In contrast, the Stipulation provided for payment of fees of the Trustee's general counsel subject to a \$50,000 cap.

On November 17, 2004, the Court authorized the Trustee to employ Janssen, Keenan & Ciardi as general counsel to the Trustee. On July 20, 2005, the Court approved the retention, nunc pro tunc, of Ciardi & Ciardi, PC as substitute general counsel to the Trustee. On October 7, 2005, and December 28, 2006, the Court approved the final fee applications for the Trustee's general counsel, which totaled \$77,805. Even though the allowed fees exceeded the Stipulation's cap by \$27,808, the Trustee paid them.

The Modification Motion before the Court asks that the cap be modified because of "unanticipated" complexity in the

protection, marketing and sale of the assets. The Modification Motion also requests a reduction in the unsecured creditors' carve-out from \$50,000 to \$30,000 because of the need to render these "unanticipated" services. The Modification Motion seeks permission to limit notice of the Motion under Rule 2002(m) of the Federal Rules of Bankruptcy Procedure.

Although there was no objection to the Motion, a hearing was held on May 9, 2007, at which time the Court advised the Trustee's general counsel that it would review the Motion and the final fee applications to determine if the relief requested was warranted.

II. JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C §§ 1334 & 157(a). Consideration of this matter constitutes a core proceeding under 28 U.S.C. § 157(b)(2)(M).

III. DISCUSSION

A. Lack of Clarity

The Modification Motion does not clearly state the specific relief sought by the Trustee's general counsel. The Motion allows for two interpretations. The Trustee may be requesting a reduction in the unsecured creditor's carve-out to permit payment of the \$27,805 in general counsel fees that already exceeded the

cap. If this is the case, however, it does not appear to be necessary. The Trustee has already paid general counsel's fees in full as reflected on the cash disbursements report attached to the motion and there is still more than \$52,500 in the Trustee's account to pay the unsecured creditors.

Alternatively, the Trustee could be seeking to reduce the unsecured creditors' fund to permit him to pay an extra \$20,000 to general counsel. This request is without any further fee application having been filed and would result in general counsel receiving almost double the Stipulation's \$50,000 cap.

The Court finds it unnecessary to decide which scenario is correct as in neither case is the relief requested warranted.

B. Section 105(a)

The Modification Motion asserts that under section 105(a) of the Bankruptcy Code, the court "must" allow the reduction in the carve-out to the unsecured creditors. The Court disagrees. Section 105(a) actually states that "the court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a) (emphasis added). There is a big difference between may and must.²

² See, Webster's II New Riverside University Dictionary (Anne H. Soukhanov ed., The Riverside Publishing Company, 1984) (defining "may" and "must," respectively, as "to be allowed or permitted to," and "to be required or obliged by law, morality, or custom."); see also Richard C. Wydick, Plain English for

The Trustee's general counsel argues, however, that the relief requested should be granted on equitable grounds under section 105(a) because he was told that the Debtor's intellectual property was worth millions, when, in fact, it sold for only \$50,000.

Under section 105(a), the Court may modify an order if it is equitable to do so. In re Marcus Hook Dev. Park, Inc., 943 F.2d 261, 265 n.5 (3d Cir. 1991); see also In re Olsen, 861 F.2d 188, 189 (8th Cir. 1988) (stating that bankruptcy courts have general authority to change terms of their own orders when equity so requires); In re Radco Merch. Servs., Inc., 111 B.R. 684, 689 (N.D. Ill. 1990) ("like a court of equity, the bankruptcy court has the power to amend, modify, or vacate its earlier order."). Equitable remedies under section 105(a) are limited, however, and should be used only to further the substantive provisions of the Code. In re Joubert, 411 F.3d 452, 455 (3d Cir. 2005) (following In re Morristown & Erie R.R. Co., 885 F.2d 98, 100 (3d Cir. 1990)); see also In re Jamo, 283 F.3d 392, 403 (1st Cir. 2002); United States v. Sutton, 786 F.2d 1305, 1308 (5th Cir. 1986); Lawrence P. King, *Collier on Bankruptcy*, ¶ 105.01[2] at [105-7]-[105-8] (15th ed. rev. 2007). The Trustee has failed to explain

Lawyers, 64 (5th ed. Carolina Academic Press, 2005) (noting that "may" indicates that it is at the court's discretion or is permissive and "must" indicates that the court is required to do something).

how the modification of the Stipulation would further a substantive provision of the Code and, thus, has failed to justify equitable relief under section 105(a).

The Trustee claims, however, that relief under general equitable principles is warranted because of the "unanticipated" liaison services that the Trustee's counsel provided. The Court may set aside a stipulation under general equitable principles.

In re Royster Co., 132 B.R. 684, 689 (Bankr. S.D.N.Y. 1991).

However, "stipulations entered into freely and fairly, and approved by the court, should not be lightly set aside." Waldorf v. Shuta, 142 F.3d 601, 616 (3d Cir. 1998) (quoting Kohn v. American Metal Climax Inc., 458 F.2d 255, 307 (3d Cir. 1972), partially overruled on other grounds en banc by Kershner v. Mazurkiewicz, 670 F.2d 440, 448 (3d Cir. 1982)). One instance where a stipulation may be set aside is to prevent a manifest injustice.³ Waldorf, 142 F.3d at 618; see also Royster, 132 B.R. at 689 n.5. Another instance is when "unforeseen circumstances have made the decree oppressive." Royster, 132 B.R. at 689 n.5.

The Trustee has failed to show how granting the Modification Motion would prevent a manifest injustice or how unforeseen

³ Courts have considered the following factors in determining a manifest injustice: (1) the stipulation's effect on the party seeking withdrawal, (2) the stipulation's effect on the other parties, (3) whether relevant intervening events occurred since the stipulation was filed, and (4) whether substantial contrary evidence to the stipulation exists. Waldorf, 142 F.3d at 617-18.

circumstances have made the Stipulation oppressive. The Trustee asserts that proof of the "unanticipated" services can be found in the previously approved fee applications. In fact, there is no evidence in the billing records of what services were "unanticipated" for which additional reimbursement is sought. The billing records simply describe normal attorney tasks in the negotiation, sale and maintenance of the intellectual property. Absent a redundant and costly cross-reference of countless records, the Court sees no way in which Trustee's general counsel could reliably distinguish such time entries, which span over two years, to support this position. Given the fact that the Trustee has failed to show that the services rendered were actually "unanticipated," there is no basis to prove that unforeseen circumstances have made the Stipulation oppressive or that granting the Modification Motion would prevent a manifest injustice. Therefore, the Court will not grant the Modification Motion on general equitable principles.

C. Rule 60(b)

Additionally, the Trustee's counsel argues that equitable relief should be granted because the Stipulation was voided by an amended agreement between the parties. This argument actually falls under Rule 9024 of the Federal Rules of Bankruptcy Procedure, which incorporates Rule 60 of the Federal Rules of Civil Procedure. Particularly, the Trustee's argument falls

under Rule 60(b)(4). See Fed. R. Bankr. P. 9024 ("On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void[.]"); Fed. R. Bankr. P. 9001(7) (defining "judgment" as "any appealable order").

When Rule 60(b) applies, the equitable powers of section 105(a) are limited to the confines of that rule. See generally In re Combustion Engineering, Inc., 391 F.3d 190, 236 (3d Cir. 2004) (holding that the general grant of equitable power contained in section 105(a) must be exercised within the parameters of the Code itself); In re Durability Inc., 212 F.3d 551, 556 (10th Cir. 2000), rev'd on other grounds, 166 Fed. Appx. 321 (10th Cir. 2006) (unpublished) (holding that a party seeking amendment of a stipulation need only show good reason as long as the request "is not controlled by a rule of procedure"); In re Met L-Wood-Corp., 861 F.2d 1012 (7th Cir. 1988) (indicating that when Rule 60(b) applies, the inherent judicial power to reconsider judgments is proscribed by the scope of that rule).

The Trustee provided no evidence of such an amendment or that the amendment was ever approved by the Court. The docket reflects that no amendment was filed. Accordingly, there is no basis for the Trustee's argument that the Stipulation was voided by another agreement.

D. Section 328

The Trustee also argues for relief from the Stipulation under both sections 328 and 330 of the Bankruptcy Code. Specifically, the Trustee invokes the improvident standard under section 328 and the reasonableness standard under section 330. The Court must approve a professional's fee application under section 328 or section 330, but not both. F.V. Steel and Wire Co. V. Houlihan Lokey Howard & Zukin Capital, L.P., 350 B.R. 835, 839 (Bankr. E.D. Wisc. 2006); see also, In Re Barron, 225 F.3d 583, 586 (5th Cir. 2000). In this case, the retention motions for the Trustee's counsel were filed under section 327 and the Court reviewed all fee applications for the Trustee's counsel and substitute counsel under section 330's reasonableness standard.

Additionally, section 328 and section 330 are not directly applicable to the situation at hand. Sections 328 and 330 are the standards by which the Court must review and approve fees of professionals. The fees of Trustee's counsel have already been approved in this case (totaling \$77,805), which exceeds the Stipulation's \$50,000 cap. If the Trustee is seeking an additional \$20,000 in fees, he has failed to submit the required fee application in accordance with Rule 2016 of the Federal Rules of Bankruptcy Procedure and Local Rule 2016. See Fed. R. Bankr. P. 2016; Del. Bankr. L.R. 2016. If this is the case, then the Trustee is requesting a nunc pro tunc approval of fees without a

fee application and a de facto guarantee of payment. The Code offers neither type of relief.

Although not clearly stated in the Modification Motion, the Trustee's reference to section 328 could be an invocation of the section by analogy to support his request for general equitable relief. The Trustee argues that the Stipulation has proven to be improvident given the "unanticipated" developments in this case. Section 328(a) states that the court may allow compensation different from what was previously approved "if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions." 11 U.S.C § 328(a). The improvident test under section 328 is foresight-driven, not hindsight-determinative. See In re Barron, 325 F.3d 690, 693 (5th Cir. 2003); In re High Voltage Eng'g Corp., 311 B.R. 320,330-31 (Bankr. D. Mass. 2004). The Trustee's argument is hindsight-driven. He asserts that the Stipulation "is improvident in light of the unanticipated developments in this case" The Stipulation is not improvident because the alleged "unanticipated" developments were capable of being anticipated at the time of the fixing of the Stipulation's terms and conditions. The Trustee and general counsel certainly could have anticipated that the assets would not be sold for much at the time the Stipulation was executed. Therefore, the Trustee's

use of section 328 by analogy to advance his equitable argument fails.

E. Motion to Limit Notice Need Not Be Considered

Because the Trustee's motion will be denied, the request to limit notice need not be considered at this time.

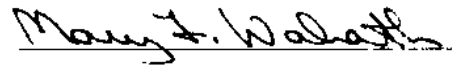
IV. CONCLUSION

For the reasons stated above, the Trustee's Motion will be denied.

An appropriate order is attached.

Dated: August 6, 2007

BY THE COURT:

A handwritten signature in black ink, appearing to read "Mary F. Walrath", is written over a horizontal line.

Mary F. Walrath
United States Bankruptcy Judge